DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Petitioner, v. MARK TEREN, W & D LLC, YA YAN TAM, NEWTON PARTNERS, LLC, LONNIE R. LOWE, 1812 35th STREET ASSOCIATES LLC, ROBERT F. McCULLOCH, MISSION TO THE 20TH CENTURY, ROCK CREEK PLAZA-WOODNER, L.P.,CHARLES MORRA, VERINIQUE BARDACH, MATTIE EVANS Respondents	Case Nos.: CR-C-06-100005 CR-C-06-100012 CR-C-06-100019 CR-C-06-100015 CR-C-06-100014 CR-C-06-100020 CR-C-06-100025 CR-C-06-100022 CR-C-06-100024 CR-C-06-100023 CR-C-06-100021 CR-C-05-100000 (Consolidated)

ORDER

I. Introduction

On January 18, 2006, Respondent, Marc Teren, through his attorney, Cynthia A. Giordano, Esq., filed a letter with this administrative court requesting a hearing to contest a Notice of Violation And Notice To Abate issued by the Department of Consumer and Regulatory Affairs ("DCRA"). The Notice directed Mr. Teren to correct an alleged building code violation on his property. It did not, however, seek to impose a fine for the alleged violation. Thus, this case is unlike cases routinely brought by DCRA seeking to impose fines for alleged violations under the Civil Infraction Act. D.C. Official Code § 2-1801 *et seq.*

Respondent's hearing request raised the threshold issue of whether this administrative court has subject matter jurisdiction to consider the issues raised in that request and whether DCRA's issuance of the Notice is subject to this tribunal's review.

Due to the jurisdictional nature of this issue, on May 15, 2006, the Chief Judge of the Office of Administrative Hearings ("OAH") issued an Order (the "Order"), *sua sponte,* directing that a three judge panel (the "Panel") be convened pursuant to OAH Rule 2840.2 to determine if DCRA's issuance of the Notice is subject to this administrative court's jurisdiction.[1]

The Order directed the Panel to decide: (1) whether OAH has jurisdiction to review a Notice of Violation/Notice to Abate issued by the DCRA; and, if so, (2) what is the standard of review, and (3) what is the remedy following review, *i.e.*, does OAH have the authority to affirm, vacate or otherwise modify that Notice? The order also authorized the consolidation of other pending cases that have common questions of law or fact.

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[1] OAH Rule 2840.2 provides in part:

> Where a decision of an Administrative Law Judge is in conflict with a decision of a least one other Administrative Law Judge on the same issue, or where litigants before this administrative court would likely benefit from a clear precedent on a particular legal issue, the Chief Administrative Law Judge may, upon motion by a party in a pending adjudicative case, or upon his or her own motion and in the interest of justice, assign three Administrative Law Judges to sit on a panel and decide all or part of the pending case. To the extent administratively convenient and operationally practical, the Chief Administrative Law Judge shall seek to appoint Administrative Law Judges who have not participated in prior conflicting decisions, but may elect to appoint the Administrative Law Judge who has presided over the pending adjudicative case. Any order or interlocutory order issued by such a panel shall be treated as a binding precedent of a higher court in all matters subsequently coming before this administrative court, unless later reversed or modified by law, by decision of the District of Columbia Court of Appeals, or by a subsequent order of that panel or another panel acting under this Section. In determining whether to convene a panel under this Section, the Chief Administrative Law Judge may consider, among other things, whether the panel is likely to provide clarity and guidance in an important legal issue before this administrative court.

On June 26, 2006, this court entered its Order consolidating the eleven additional cases listed in the above caption with Mr.Teren's case.[2] They include five cases that involve Notices of Violation/Notices to Abate alleging violations of building code regulations under Title 12 of the DCMR and six cases that involve Notices of Violation alleging violations of housing code regulations issued under Title 14 of the DCMR. (Notices issued under either Title 12 or Title 14 are hereafter referred to as the "DCRA Notices").

The June 26th Order also directed DCRA to file, and concurrently serve upon every other party, a memorandum of points and authorities on the issues. Additionally, Respondents in the consolidated cases were invited to file memorandum of points and authorities on the issues and to respond to DCRA's memorandum. This Order further provided that the failure of any party to file a memorandum, was deemed a waiver of that party's right to present any oral argument.

At the hearing scheduled for oral arguments on October 26, 2006, counsel for the parties filing memorandum, DCRA, Ya Yan Tam, Mission To The 20th Century, W & D, L.L.C., Newton Partners, L.L.C., and Rock Creek Plaza-Woodner L.P., appeared and presented their positions. All of the parties assert that OAH has jurisdiction to consider hearing requests filed to contest DCRA Notices.

[2] On June 24, 2006, Mr. Teren filed a Motion To Dismiss the Notice issued by the DCRA. No response to the motion has been filed nor has a decision been issued by this Court.

II. Discussion

The subject matter jurisdiction of OAH extends to "all cases to which [the OAH Establishment Act of 2001] applies." D.C. Official Code § 2-1831.02(a). The cases to which the OAH Act applies are enumerated in § 2-1831.03. That list includes "adjudicated cases" arising under the jurisdiction of the DCRA. D.C. Official Code § 2-1831.01 defines the term "adjudicated case" as follows:

> "Adjudicated case" means a contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type. The term "adjudicated case" includes, without limitation, any required administrative adjudicative proceeding arising from a charge by an agency that a person committed an offense or infraction that is civil in nature.

In each of these consolidated cases, DCRA issued a Notice alleging that a condition on property owned or managed by the Respondent violated a regulation in either Title 12 (building code) or Title 14 (housing code) of the DCMR. The DCRA Notices direct the property owner to correct the alleged violation within a specified time-frame.[3] The Notices, citing D.C. Official Code § 42-3131.01(a) (the "Statute"), afford the property owner the opportunity to "show cause" to the Mayor why the condition should not be corrected; however, if the property owner does not elect to "show cause" or correct the condition, the Notices indicate that, the Mayor may correct the alleged

[3] Pursuant to D.C. Official Code § 42-3131.01(a), the time period specified for correction must afford the property owner "reasonable notice" before the Mayor initiates corrective action. In addition, notices of housing code violations issued under Title 14 of the DCMR must "[a]llow a reasonable time for the performance of any act required by the notice." 14 DCMR 105.2(c). *See DCRA v. Estate of Frank E. Johnson*, OAH No. CR-I-05-R100470 (Final Order 2005)

violation and recover the cost of the work through an assessment on the property owner's tax bill.[4]

The District of Columbia Court of Appeals has held that the Statute authorizes the Mayor to correct "any condition which exists or has arisen from real property that violates any law or regulation" and is not limited to abatement of conditions that might be classified as nuisances or life-threatening. *Auger v. D.C. Board of Appeals and Review* 477 A.2d 196, 210 (D.C. 1984); *District of Columbia v. North Washington Neighbors, Inc*, 367 A.2d 143, 146 (D.C. 1976). (D.C. Official Code § 42-3131 [formerly 5-313], read in conjunction with applicable regulations authorized the District to repair property owners' water pipes and assess cost against the property.)

Pursuant to its enabling legislation, OAH has jurisdiction to conduct hearings on appeals from DCRA Notices if "the legal rights, duties, or privileges of specific parties *are required* by any law or constitutional provision to be determined" by such hearings.

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[4] D.C. Official Code § 42-3131.01(a) provides in part:

> Whenever the owner of any real property in the District of Columbia shall fail or refuse, after the service of reasonable notice in the manner provided in § 42-3131.03, to correct any condition which exists on or has arisen from such property in violation of law or of any regulation made by authority of law, with the correction of which condition said owner is by law or by said regulation chargeable, or to show cause, sufficient in the judgment of the Mayor of said District, why he should not be required to correct such condition, then, and in that instance, the Mayor of the District of Columbia is authorized to: Cause such condition to be corrected; assess the fair market value of the correction of the condition or the actual cost of the correction, whichever is higher, and all expenses incident thereto (including the cost of publication, if any, herein provided for) as a tax against the property on which such condition existed or from which such condition arose, as the case may be; and carry such tax on the regular tax rolls of the District, and collect such tax in the same manner as general taxes in said District are collected...

D.C. Official Code § 2-1831.01 (emphasis supplied*)*. Thus, a property owner has a right to challenge a DCRA Notice in a proceeding before OAH *only* if such right is found in a law or constitutional provision and the case arises under the jurisdiction of the DCRA (or one of the other agencies enumerated in D.C. Official Code §2-1831.03). We address each of these issues below.

A. **Right to a Constitutional Due Process Hearing**

No statute or regulation expressly provides for a hearing in cases arising under the Statute; however, the Constitution requires such a hearing. The Due Process Clause of the Fifth Amendment prohibits the District from depriving "any person of life liberty or property, without due process of law." U.S. Const. amend V; *Orange v. District of Columbia Board of Elections and Ethics,* 629 A.2d 575, 579 n.5 (D.C. 1993) (Fourteenth Amendment jurisprudence applies to the District through the Due Process Clause of the Fifth Amendment).

In considering whether a right to procedural due process exists, a court must first determine whether state action threatens or causes the deprivation of a protected liberty or property right. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976). Property interests are not created by the Constitution but rather "stem from an independent source such as state law." *Roth, supra* at 577; *3883 Connecticut LLC v. District of Columbia et al.,* 336 F.3d 1068 (D.C. Cir. 2003) (District of Columbia Construction Code provided a basis for a builder's property interest in building permits.) Under District of Columbia law, interests in real estate, including leaseholds, are recognized property interests. D.C. Official Code § 42-501 *et seq*.

Due Process protections normally require a hearing before the state takes action that deprives a person of a protected liberty or property right. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process.") The Supreme Court has held that a hearing *after* a person has suffered a loss of a protected liberty or property right is not adequate "absent 'the necessity of quick action by the state or the impracticality of providing any predeprivation process.'" *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982).

In *Auger, supra,* the District of Columbia Court of Appeals held that because the Statute authorized an administrative agency to deprive an owner of property, due process required the agency to give a property owner the opportunity for a hearing before the agency took action to remove a sign on the owner's property.[5] In that case, Department of Housing and Community Development ("DHCD"), acting under the Statute, ordered a property owner to remove a sign or show cause why he should not be required to do so. If the owner did not remove the sign, the DHCD advised that it would "cause this condition to be corrected" and assess the costs of removal against the owner. The Court found that if the owner requested the opportunity to "show cause … why he should not be required to correct such condition", due process entitled him to a contested case hearing before the DHCD. *Id* at 211.

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[5] At the time that *Auger, supra* was decided in 1983, the Statute, now codified as D.C. Official Code § 42-3131.01 (2001) was codified as D.C. Official Code § 5-313 (1973)

Under established precedent, a property owner has a right to a hearing not only when the government threatens to take property, as in *Auger*, but also when it threatens to interfere with an owner or leasee's right to possession. "One of the sticks in the bundle of property rights includes the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979). The right to exclude others from one's property includes the right to be free from unreasonable governmental interference. *Thomas v. Cohen,* 304 F.3d 563, 573-74 (6th Cir. 2002) ("Because the right to exclude others is one of the main rights attaching to property, tenants in lawful possession of a home or apartment have a legitimate expectation of privacy by virtue of having a property interest in a specific piece of real estate.") Even when a property interest may seem insubstantial by some standards, due process normally requires a hearing before the government interferes with that interest. *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978) (municipal utility must provide "some kind of hearing" before terminating service.) *Bonds v. Cox,* 20 F.3d 697 (6th Cir. 1994) (damage to a house, including broken doors, mutilated vinyl siding, broken desks and holes in walls, constitutes a meaningful interference with one's possessory interests.)

The DCRA's Notices demand correction of an alleged violation of the Government's regulations. Notices issued under Title 14 advise that if the owner fails to correct the condition the Mayor, under the authority of the Statute, "may cause said condition to be corrected, assess the cost and all expenses incident thereto, as a tax against the property …" Notices issued under Title 12 similarly threaten to correct alleged violations and as authority quote relevant language from the Statute.[6]

[6] In *Auger, supra*., the Court noted that the Mayor had delegated his authority under the Statute to the DHCD. The Mayor has since redelegated all authority previously delegated

Other than actual seizure, it is difficult to conceive of a more meaningful interference with one's property than the uninvited entry of a government official bent on "correcting" perceived code violations. Implicitly recognizing the drastic nature of this measure, the Statute authorizes such action only after the owner receives notice and an opportunity to show cause to the Mayor why the condition should not be abated. The Constitution in turn requires that, except in exigent circumstances, the relative legal rights of the Government to correct a code violation and a property owner to be free from Government intrusion must "be determined after an adjudicative hearing."[7]

B. DCRA's Jurisdiction

In order for OAH to have jurisdiction over appeals from DCRA Notices, the cases must arise under the jurisdiction of DCRA or one of the other agencies listed in D.C. Official Code § 2-1831.03. The provisions that define DCRA's scope of authority lead us to conclude that cases arising under the Statute fall within DCRA's jurisdiction.

DCRA was established in 1983. The statute that created the agency conferred upon it a wide array of functions that included the authority to enforce housing and building code regulations within the District.[8] Specifically, the statute granted DCRA authority to insure:

> [T]hat the physical environment and structure of all buildings in the

to the DHCD to DCRA. Mayor's Order 83-92, April 7, 1983.

[7] D.C. Official Code § 42-3131(c) authorizes the Mayor to "cause the summary correction of housing regulation violations where a life-or-health threatening condition exists." *Logan, supra.,* recognizes that a predeprevation hearing may not be required in the face of "the necessity of quick action by the state."

[8] 1983 Reorganization Plan No. 1, codified at D.C. Official Code §1-1983-9.

> District of Columbia meet all applicable regulations and codes for preservation or the use to which the space or structure is to be put; assurance that public and private land and structures meet adequate health, safety and environmental standards.[9]

In addition, pursuant to the statute, [10] the Mayor re-delegated to the Director of DCRA functions related to enforcement of building and housing regulations that he had previously delegated to the Director of the Housing and Community Development.[11] The authority previously delegated to the Director of Housing and Community Development included authority to administer and enforce:

> [T]he statutes, codes and regulations governing housing, and the construction, erection, maintenance, repair, alteration, inspection, zoning, occupancy, use and removal of buildings and their appurtenances and electrical and mechanical equipment.[12]

Since the Statute authorizes the Mayor to correct code violations on real property, it is clearly a statute relating to "housing, and the construction, erection, maintenance, repair, alteration, inspection, zoning, occupancy, use and removal of buildings." Through the Mayor's delegation of this authority, DCRA has jurisdiction under the Statute to issue notices and take corrective action. The constitutional due process hearings, required

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[9] D.C. Official Code § 1-1983-9(III)(A)(4).

[10] D.C. Official Code § 1-1983-9(III)(B).

[11] Mayor's Order 83-92 issued April 7, 1983.

[12] Reorganization Plan No. 3 of 1975 codified at D.C. Official Code 1-1975 No. 3-3(m) Reorganization Plan No. 3 of 1975 also specifically transferred to the Department of Housing and Community Development all functions " relating to the administration and enforcement of the building and housing codes and the zoning laws and regulations" previously performed by Department of Economic Development." D.C. Official Code 1-1975 No. 3-7.

when a property owner challenges these actions, are thus cases arising under DCRA's jurisdiction. OAH consequently has jurisdiction of hearings in these cases.

C. Standard of Review, Burden of Proof and Remedy

When an OAH hearing is required as a matter of constitutional right, as in this case, the District of Columbia Administrative Procedure Act ("DCAPA") requires that the hearing be conducted in accordance with its "contested case" provisions:

> The term "contested case" means a proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are *required by any law ... or by constitutional right, to be determined after a hearing* before the Mayor or before an agency … [Emphasis added]

D.C. Official Code, § 2-502(8). Moreover, the Court of Appeals has found specifically that a property owner who elects to show cause, pursuant to the Statute, is entitled by due process to a "contested case" hearing. *Auger*, 477 A.2d at 209. Because the DCAPA requires that decisions in contested case hearings be based solely on the record developed in the proceeding (no sanctions may be imposed nor rules or orders issued "except upon consideration of such exclusive record"), OAH's standard of review in these cases is *de novo*. D.C. Official Code, § 2-509(c).

The DCAPA requires ALJs to issue written decisions containing findings of fact and conclusions of law. These findings and conclusions must be supported by and in accordance with "reliable, probative and substantial evidence." D.C. Official Code § 2-509(e). The findings of fact must contain a finding on each material, contested issue, and must be based on substantial evidence. The conclusions of law must flow rationally

from the factual finding. *See Powell v. D.C. Housing Auth.,* 818 A.2d 188, 196 (D.C. 1996).

In addition to this standard of review, we also must look to the DCAPA to determine burden of proof. The DCAPA governs the issue of burden of proof unless a statute, regulation, or other law of the District of Columbia specifies a different burden in a particular proceeding. The DCAPA provides: "In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof." D.C. Code, 2001 Ed. §2-509(b). The rule placing the burden of proof on the proponent of a rule or order is based on the policy of requiring the party seeking to change the status quo carry the burden of proof. *Puerto Rico v Federal Maritime Comm*, 468 F2d 872, 881 (D.C. Cir. 1972). The DCAPA rule has been interpreted to mean that the party asserting a particular fact has the burden of affirmatively proving that fact. *Columbia Realty Venture v. DC Rental Housing Com'm*, 590 A.2d 1043, (D.C. 1991); *Plummer v. DC Bd. Of Funeral Directors,* 730 A.2d 159 (D.C. 1999).

In *Columbia Realty Venture*, tenants fighting a rent increase alleged that a contractor's fee was actually a kickback to the management company. 590 A.2d at 1048. The management company had added a ten percent contractor's fee to the cost of the capital improvements (that may be included in the petition to raise rents). The Rental Housing Commission ("RHC") disallowed the fee, holding that the management company failed to meets its burden to demonstrate why the fee was being paid. The D.C. Court of Appeals reversed the RHC, holding that the RHC had improperly shifted the burden to the landlord. The Court, quoting a previous opinion, stated: "the party

asserting a particular fact – here, the 'fact' that the fee was "nothing but a kickback to the management company – has the burden of affirmatively proving that fact . . . This burden cannot be sustained simply by showing a lack of substantial evidence to support a contrary finding." *Id.*

In the cases before us, property owners are seeking hearings to demonstrate that the owners should not be required to correct an existing condition on real property. The Statute authorizes the Mayor to correct any existing condition on real property after notifying the property owner that the Mayor believes that the condition violates a law or regulation. Yet, it affords the property owner the opportunity to "show cause" why he/she should not be required to correct this condition. Thus, DCRA may send a notice and require corrective action only if it deems that a violation of a law has occurred; however, the DCRA Notice merely asserts bare allegations of facts that may or may not support the conclusion that a violation exists. As with the tenants in *Columbia Realty Venture*, *supra*, it is the Government (and not the property owner) that is asserting that a particular condition violates a law and thus must establish the existence of an actual violation. Moreover, it is the Government that is seeking a change in the status quo by asserting that an existing condition on a property must be changed to comply with the law. Thus, although the property owner may seek a "show cause" order, the Government must first demonstrate by a preponderance of the evidence that a violation has occurred.[13] In addition to introducing evidence to rebut the Government's contention that a violation

[13] Since there no statute or regulation that prescribes a different level of proof for cases arising under the Statute, the applicable standard of proof for each party is a "preponderance of the evidence", *Steadman v. SEC* 450 U.S. 91 (1981) (construing provisions in the Federal APA similar to provisions of the DCAPA). *Sherman v. Commission on Licensure to Practice Healing Art*, 407 A.2d 595, 600 (D.C. 1979) ("the traditional standard for administrative proceedings… --a preponderance of the evidence" was applicable in an administrative license revocation proceeding.)

exists, a property owner may defend by demonstrating that there are circumstances that justify noncompliance with a statute or regulation. If the Government meets its burden and demonstrates that a violation exists, the burden of proof would then shift to the property owner, who must justify why the condition should not be corrected. The claims that will be recognized as defenses justifying why a property owner need not correct a condition will be determined on a case by case basis.

At the conclusion of the hearing, with the Government bearing the burden of proof to establish the violation and the property owner bearing the burden to demonstrate that he/she should not be required to remedy the condition, the ALJ must issue a Final Order. The ALJ may only rule on the case and the issues arising from the DCRA Notice. Therefore, the Order must determine whether a violation exists, and if so, whether the property owner should be required to correct the condition.

D. Conclusion

The DCRA Notices threaten significant interference by the Government with private property rights. Absent an emergency, due process requires a "contested case" hearing before such an intrusion may be constitutionally permitted. The hearings thus mandated are "adjudicated cases" arising under the jurisdiction of the DCRA. As a result, OAH has jurisdiction of appeals from DCRA Notices. D.C. Official Code §§ 2-1831.01 and 2-1831.03.

The standard of review applicable in these hearings is *de novo.* D.C. Official Code, § 2-509(c). Moreover, the Government bears the burden of proof to establish that

a violation exists. If the violation is established, the property owner then bears the burden to demonstrate that he/she should not be required to remedy the condition.

III Order

Therefore, it is this _____ day of _____ 2006:

ORDERED, that OAH has jurisdiction over DCRA Notices issued under Title 12 or Title 14 of the DCMR, and it is further

ORDERED, that further proceedings on the consolidated cases shall be scheduled upon their separate assignment by the clerk of this court to presiding administrative law judges.

_____
Mary Masulla
Administrative Law Judge

_____
Wendy Moore
Administrative Law Judge

_____
Louis Burnett
Administrative Law Judge

/s/ December 28, 2006